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Nos. 94-1664 and 94-8842

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

STACEY C. KOON and
LAURENCE M. POWELL

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF *AMICUS CURIAE* NATIONAL ASSOCIATION OF POLICE ORGANIZATIONS, INC. IN SUPPORT OF PETITIONERS

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STATEMENT OF INTEREST OF THE NATIONAL ASSOCIATION OF POLICE ORGANIZATIONS

Amicus Curiae the National Association of Police Organizations, Inc. (hereinafter "NAPO") submits this brief in support of Stacey C. Koon and Laurence M. Powell's petitions for reversal of the judgement in this case of the United States Court of Appeals for the Ninth Circuit which vacated the original sentences of petitioners and remanded their cause for resentencing.

NAPO is a nationwide association of labor and trade organizations representing state, local and federal law enforcement officers. Among other entities, NAPO represents the Los Angeles Police Protective League, the certified labor bargaining agent representing the bargaining units which include petitioners Koon and Powell. NAPO also represents law enforcement officers throughout the rest of the state of California, the Ninth Circuit, and the United States. Through its state and local affiliates, NAPO actively represents approximately 185,000 sworn law enforcement officers throughout the country. In 1994, NAPO founded the National Law Enforcement Officers' Rights Center, which advocates the necessity of assuring fundamental due process rights for law enforcement officers in the face of increasing political pressures for the investigation and prosecution of police.

NAPO has an important interest in this matter, as the case presents issues the resolution of which will define the extent to which the particular and unusual circumstances attendant upon the criminal prosecution and conviction of a police officer may be properly taken into consideration by a

trial court in passing sentence.

Internal police department investigation into the conduct of individual officers is now routine. Civil and criminal prosecution of individual officers is rapidly increasing at both the state and federal levels. Such cases frequently attract intense publicity and are likely to arouse prolonged and emotional public debate. Officers' basic rights are often in danger of being sacrificed on the altar of political expediency. A clear enunciation of the rights secured to individual officers accused of wrongdoing is of crucial value to the officers represented by NAPO, as well as to the various departmental, judicial, defensive and prosecutorial entities involved.

NAPO has received the written consent of petitioners Koon and Powell and of respondent the United States of America to the filing of this brief as required by Rule 37.3 (a) of the Rules of this Court. The original copies of all consents have been filed with the Clerk of the Court as required by that Rule.

SUMMARY OF ARGUMENT

The United States Sentencing Guidelines are not intended to be, nor do they constitute, an exhaustive, finite and exclusive set of factors to be considered by a trial court in passing sentence. The full range of human conduct and circumstance which might prove relevant to the determination of an appropriate sentence for a given offense is too vast and complex to be completely anticipated in any finite compilation of precepts. This is particularly true in the extraordinary case of the sentencing of a police officer for *criminal* federal civil rights misconduct in the course of duty.

Several factors unique to the offense and actors in this case were properly considered in this case by the original sentencing court below. These factors of provocation and victim misconduct were not already incorporated into the relevant Guidelines by the United States Sentencing Commission. The petitioners are also at unique and extreme risk in prison and have suffered additional punishments beyond their prison terms because of the fact that they are former law enforcement officers. These factors constitute circumstances which were properly taken into account by the trial court in determining an appropriate sentence in this case.

Under either a deferential or *de novo* standard of review, they remain viable and appropriate circumstances for consideration by a sentencing court and provide ample justification for the departure sentences meted out to the petitioners in this matter.

ARGUMENT

I. PROVOCATION AND VICTIM MISCONDUCT.

A. The Ninth Circuit erred in concluding that "provocation" or victim misconduct is included in the base offense level for U.S.S.G. § 2H1.4, 18 U.S.C.A.App., so that such a circumstance can only justify a downward departure in the most extreme case.

Without any data whatsoever, nor any support from the publications of the United States Sentencing Commission (hereinafter "the Commission"), the Ninth Circuit concluded that some degree of provocation or victim misconduct was typical of most criminal violations of 18 U.S.C. § 242. Accordingly, the Court of Appeals concluded that victim misconduct could be a ground for departure only in the most extreme of cases. This holding is manifestly incorrect and inconsistent with the United States Sentencing Guidelines and policy statements promulgated by the Commission..

1. Chapter Five of the Guidelines demonstrates that the Commission did not take victim conduct into account in formulating U.S.S.G. § 2H1.4, 18 U.S.C.A.App. (1989).

Policy Statement U.S.S.G. § 5K2.0 p.s., 18 U.S.C.A.App. (Grounds for Departure)[1] provides in relevant

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[1] Citations are to the version of the United States Sentencing Guidelines (hereinafter "the Guidelines") and policy

part:

> The controlling decision as to whether and to what extent departure is warranted can only be made by the courts. Nonetheless, this subpart [5K2] seeks to aid the court by identifying some of the factors that the Commission has not been able to take into account fully in formulating the guidelines . Any case may involve factors in addition to those identified that have not been given adequate consideration by the Commission. Presence of any such factor may warrant departure from the guidelines, under some circumstances, in the discretion of the sentencing court. Similarly, the court may depart from the guidelines, even though the reason for departure is taken into consideration in the guidelines (e.g., as a specific offense characteristic or other adjustment), if the court determines that, in light of unusual circumstances, the guideline level attached to that factor is inadequate.

Section 5K2.10 (Victim Conduct) expressly sanctions a downward departure "[i]f the victim's conduct contributed substantially to provoking the offense behavior." It does not preclude reliance on this ground for departure with respect to any offense. Section 5K2.10 does state that "[v]ictim misconduct *ordinarily* would not be sufficient to warrant

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statements which took effect on November 1, 1989, unless otherwise expressly noted.

application of this provision in the context of [sexual abuse cases]" and "*usually* would not be relevant in the context of non-violent offenses" (emphasis added). But this language only reinforces the conclusion that the Commission anticipated that victim provocation *would* often be a ground for departure in other cases, including the offenses at issue here.

Together, §§ 5K2.0 and 5K2.10 mean that, unless otherwise specified in the Guidelines, the Commission did not take into consideration victim provocation in formulation of the Guidelines. Victim provocation is not a specific offense characteristic for any of the civil rights violation Guidelines nor for any other offense. Similarly, none of the Guidelines, official commentary or any other Commission publication indicate that victim provocation is included in the base offense level.[2] Only one offense for which there is a Guideline, voluntary manslaughter (§ 2A1.3), necessarily includes some form of provocation as an element. And the provocation inherent in voluntary manslaughter results in a ten-level reduction, from 38 to 28, compared to the offense level for the otherwise most analogous offense, that of second-degree

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[2] Had the Commission instead believed the absence of provocation to be an aggravating factor, it almost certainly would have said so. This is because the Commission recognized that courts would be more reluctant to depart above the Guidelines than below. *See* the Commission's *Supplementary Report to Congress on the Initial Sentencing Guidelines and Policy Statements*, June 18, 1987 (hereinafter "*Supplementary Report*"), at 66 ("The possibility of reversal on appeal might make departure above the guidelines rare (occurring primarily in truly extreme cases), while departures below the guidelines likely would be more frequent.").

murder (§ 2A1.2).

An examination of § 5K2.10 suggests that the Commission chose not to provide a specific adjustment for victim misconduct because doing so was impractical and unimportant. Section 5K2.10 lists five factors, all of them highly case-specific, which should be considered in determining whether, and to what extent, to depart. It simply is not possible to write a guideline to assign a single number to such an adjustment. And there is no real need to do so, considering that the types of offenses to which it might be applied form a negligible percentage of the cases prosecuted in the federal courts.[3] In addition, the *Supplementary Report* does not quantify the effect of victim provocation in the sample of cases analyzed by the Commission, implying that the Commission lacked adequate data to do so. *See Supplementary Report* at 27-39.[4] By adopting a policy statement approving a non-specific downward departure for victim misconduct, the

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[3] The Commission's decision to mandate a ten-level reduction for the provocation inherent in voluntary manslaughter does not detract from this conclusion. In dealing with voluntary manslaughter, any reduction made by the Commission *vis-a-vis* the Guideline for second-degree murder would be a quantified reduction based on victim provocation *by definition*. The Commission's choice of ten levels was, moreover, far more lenient than the district court's five-level departure in the case at bar.

[4] The tables in the *Supplementary Report* do, however, show that in the analogous comparison between second-degree murder and manslaughter, the data supported an average eight-level reduction for provocation. *Id.* at 27.

Commission not only encouraged district courts to reduce sentences for this reason, but allowed them to tailor the adjustment to the facts of each case.

2. The history of U.S.S.G. § 2H1.4 also demonstrates that the Commission in fact did not take victim misconduct into account when formulating that Guideline; and victim misconduct is a proper ground for departure from that Guideline.

It is readily apparent that the Commission did not take into consideration victim misconduct when formulating the Guideline for violations of 18 U.S.C. § 242. Victim provocation is not an element of these offenses, which clearly can occur without it. The presence or absence of victim misconduct is, as the trial court recognized, a highly significant factor in evaluating the egregiousness of the offense, as well as the dangerousness of the offenders. Yet the Guidelines do not discuss provocation in the context of civil rights offenses.

In setting the Guidelines for civil rights offenses, the Commission used a broad-brush approach. "[A] review of civil rights cases led the Commission to conclude that the guidelines for such offenses primarily should be tied to those for the underlying crimes, with an increase to reflect the civil rights violation as an aggravating factor." *Supplementary Report* at 18. Such an approach implicitly carries with it an acceptance of the adjustments, including grounds for departure, applicable to the underlying offense, and the Guidelines now expressly state that, when a Guideline is cross-referenced, all adjustments from Guidelines Chapters Two and Three also apply. *See* U.S.S.G. § 1B1.5 18 U.S.C.A.App. (1993) ("An instruction to

use the offense level from another offense guideline refers to the offense level from the entire offense guideline (i.e., the base offense level, specific offense characteristics, cross-references, and special instructions) . . . If the offense level is determined by a reference to another guideline . . . the adjustments in Chapter Three (Adjustments) also are determined in respect to the referenced offense guideline, except as otherwise expressly provided."). Violations of 18 U.S.C. § 242 may or may not involve violence, and the Commission was aware that victim provocation generally would be an appropriate ground for departure when the victim's conduct evoked a violent reaction. Given that a civil rights offense would clearly be more serious if wholly unprovoked, the Commission's decision to tie the Guidelines for *all* civil rights violation cases to the characteristics of the underlying offense (as opposed to treating civil rights violations cases as independent offenses in their own right) is indicative of the Commission's failing to adjust for, and *a fortiori* to consider, victim provocation or misconduct as a factor inherent in civil rights offenses committed by police. This is exactly what § 5K2.10 addresses.

The conclusion that § 2H1.4 does not take victim misconduct into account finds further support in the history of the amendments to the civil rights Guidelines. As originally promulgated, § 2H1.4 provided for a base offense level of 10 or 2 plus the level applicable to any underlying offense, whichever is higher. In the 1989 amendments, this was changed to 10 or 6 plus the level applicable to any underlying offense, whichever is higher. The rationale for this amendment was to make the Guideline sentence consistent with the Guideline sentence for other civil rights offenses if those

offenses were committed by a person acting under color of authority. Thus, in proposing the amendment, the Commission stated:

> Reason for Amendment: This amendment corrects an anomaly between the offense level under this section and § 2H1.5 [Other Deprivations of Rights or Benefits in Furtherance of Discrimination] . . . Section 2H1.4 is similar to § 2H1.5 in that it may or may not involve the use of force. Under § 2H1.4 however, the offense must involve the abuse of actual or purported legal authority. The base offense level of 10 used in § 2H1.4(a)(1) has a built-in 4-level enhancement (which corresponds to the base offense level of 6 under § 2H1.5(a)(1) plus the 4-level increase for a public official). There is an anomaly, however, when the base offense level from (a)(2) is used. In such cases, § 2H1.4 results in an offense level that is 4 levels less than § 2H1.5 when the offense is committed by a public official.

54 Fed. Reg. 21348, 21366 (1989).[5]

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[5] The Commission also erred in analogizing violations of 18 U.S.C. §§ 241, 242 to the offenses covered by the other civil rights Guidelines, since no discriminatory motive is required. The absence of proof of a discriminatory motive here would thus support a two-level downward departure.

As so amended, § 2H1.4 produces the same offense level for a public official as do § 2H1.1 (Conspiracy to Deprive of Civil Rights; Going in Disguise to Deprive of Civil Rights) and § 2H1.3 (Use of Force or Threat of Force to Deny Benefits or Rights in Furtherance of Discrimination), as well as § 2H1.5. Yet many of these offenses, especially ones that fall under § 2H1.1, could involve provocation only remotely, if at all. It is unreasonable to believe that the four-level increase for offenses committed by public officials assumes provocation when the offense is violent and unpremeditated, when it obviously does not do so in other circumstances. Because offenses that fall under § 2H1.5 and the other Guidelines in Part 2H would be quite unlikely to involve provocative victim conduct, whereas those falling under § 2H1.4 might or might not, the Commission's decision to equate all these offenses evinces a failure to take victim misconduct into account in formulating § 2H1.4.

B. In any event, the Ninth Circuit misconstrued the scope and breadth of the Guideline § 5K2.10 policy statement.

As Judge Reinhardt stated in his dissent from the denial of rehearing *en banc* below, "[t]he panel's analysis of the five-point departure . . . is premised on a highly restrictive and inflexible reading of the Guidelines . . . The panel reversed Judge Davies' [*sic*] departure, holding that, in the context of excessive force cases, an act provokes only if it precipitates an immediate response." *United States v. Koon*, 45 F.3d 1303 at 1307. More specifically, the Ninth Circuit opined:

> A close examination of the district court's

sentencing memorandum reveals that the court ultimately did not conclude that [petitioners] were provoked in precisely the manner contemplated by § 5K2.10 . . . . [Although the district court found "that [the victim's] wrongful conduct was the initial provocation for the subsequent course of events."] the court found that those factors were no longer present when the [petitioners'] conduct became criminal. The court recognized that by the time Powell struck, and Koon permitted to be struck, those blows for which [petitioners] were criminally liable, [the victim] no longer presented a danger, and was no longer persisting in misconduct. [¶] The district court thus determined not that [the victim's] misconduct "provoked" the offense conduct -- the "provocative" behavior had "subsided" before [petitioners] committed their criminal acts -- but that "the incident would not have escalated to this point, indeed, it would not have occurred at all, but for [the victim's] initial misconduct."

United States v. Koon, 34 F.3d 1416 at 1459 (9th Cir. 1994), *reh'g denied*, 45 F.3d 1303 (9th Cir. 1995). The Ninth Circuit not only mischaracterized the trial court's findings, but also misread the policy statement, which clearly is *not* "precise" but rather expansive, allowing for departure in a broad range of circumstances. As Judge Reinhardt recognized, "[t]he applicable policy statement plainly rejects the requirement of a tight nexus between the provocative behavior and the resulting unlawful conduct." 45 F.3d at 1307. Indeed, §

5K2.10 expressly endorses departure in circumstances that fall far short of the standard the Ninth Circuit would impose, such as when "an extended course of provocation and harassment [leads] a defendant to steal or destroy property in retaliation." The supposed requirement that the defendant's reaction be in immediate response to the victim's misconduct in order to successfully plead provocation as a defense was rejected long ago. *See e.g., People v. Maher*, 10 Mich. 212 (1862). Similarly, § 5K2.10 in no way requires an immediate reaction to the provocative conduct. To read such requirements into the section, which is broadly worded and deals merely with mitigation in sentencing, is insupportable.

Even if such a requirement did exist, however, it would have been met here. The district court found that the total time which elapsed between the point at which the victim ceased his wrongful conduct and the time the petitioners' unlawful conduct began was a mere twelve seconds. *See Sentencing Memorandum*, Appendix C to the *Petition for Writ of Certiorari* in *Koon v. United States*, Case No. 94-1664 (hereinafter "*Sentencing Memorandum*"), pages 101a-102a, 107a. Thus, not only is the Ninth Circuit's reading of the policy statement in error, but the factual predicate for its conclusion is missing.

The Ninth Circuit relied on *Graham v. Connor*, 490 U.S. 386 (1989), to support the proposition that, in excessive force cases, conduct does not violate the civil rights statutes unless it is unreasonable. While that may be true, it is also beside the point. Section 5K2.10 necessarily assumes that a defendant's conduct was unreasonable; otherwise one would be hard pressed to say that the defendant had committed any

criminal offense at all, even in the paradigmatic case of an assault. The policy statement deals not with a situation in which provocation is proffered as a complete or even partial defense, but rather with one in which the provocation does not rise to the level sufficient to constitute a defense at all.

Even when it suffices to exculpate the defendant or lower the degree of the offense, victim misconduct or provocation need not provoke a reasonable response in the accused. Thus, although courts historically have considered killing upon a sudden quarrel (or in the heat of passion) to be manslaughter, it is obvious that such a killing is considered unreasonable in that we expect a reasonable person to withstand the provocation, on pain of criminal prosecution and punishment. "What is really meant by 'reasonable provocation' is provocation which causes a reasonable man to lose his normal self control, and although a reasonable man who has thus lost control over himself would not kill, yet his homicidal reaction to the provocation is at least understandable [and his degree of guilt is mitigated from murder to voluntary manslaughter]." W. LaFave & A. Scott, Jr., *Criminal Law* § 7.10(b) at 654 (2d ed. 1986) Similarly,

> Provocation is said to be adequate "if it would cause a reasonable person to lose his self-control." But if a reasonable person would have committed the same offense, then arguably the defendant should merit complete exculpation for he acted no differently than the reasonable man. The actual standard probably is something less than this, just as the result of the defense is liability somewhat less than that normally imposed for an intentional killing. . . [¶] Adequate provocation commonly includes: [¶] (A) physical, unjustified attack, [¶] (B) mutual combat, [¶] (C) some instances of a threat of physical attack, . . .

P. Robinson, *Criminal Law Defenses* § 102(b)(2) (1984) (footnotes omitted). Clearly the district court was entitled to find that circumstances of this type existed in this case, even if the "reasonable police officer" might have reacted differently.

Although assault statutes typically do not make the many distinctions that are common in homicide statutes, provocation remains a relevant factor, especially at sentencing.

> Some statutes, while not providing a defense to assault and battery, sometimes specifically recognize some provocations, such as insulting and abusive words, as evidence mitigating punishment. Even absent statutory authority, courts sometimes impose a reduced sentence where an assault is committed under extreme provocation.

Robinson, *Id.* § 106 (h).

Here, § 5K2.10 provides ample authority for a downward departure. It is important to remember that in this case provocation is being considered as a sentencing factor, rather than even a partial defense. The relevant policy statement is broadly written, imposing no requirement that the response to a provocation be reasonable or that the provocation

itself be extreme. These are simply factors to be considered in determining the extent of departure. Police officers who overreact are neither as culpable nor as dangerous as those who might perpetrate premeditated acts of violence against innocent persons. The distinction made by the district court is eminently sensible and justified under the Guidelines and policy statements.

There is no basis for the Ninth Circuit's conclusion that a sentence reduction under § 5K2.10 for victim misconduct is inconsistent with the policy underlying the four-level enhancement for official misconduct in the civil rights cases Guidelines. This four-level increase reflects a conclusion that official misconduct is more culpable than similar misconduct committed by an ordinary citizen. But this conclusion does not preclude distinguishing among differing degrees of culpability. This is exactly what the trial court did in the case at bar, and properly so.

II. THE RISK OF ABUSE AND THE "ADDITIONAL PUNISHMENTS" INFLICTED ON PETITIONERS BECAUSE OF THEIR BEING POLICE OFFICERS.

Police officers are human beings. Although we might wish otherwise, they are subject to all human frailties. To ignore this fact and to impose punishment without regard for the particular circumstances involved will encourage conduct like that of the victim in this case. It will also serve to deter police officers from arresting violent and combative suspects, for fear that they, too, may be later judged to have overstepped

blurry bounds in a fluid and volatile situation, even as they thought they were doing right, only to wind up serving years in federal prison. R. Paz, *Civil Rights Laws: The Need for a New Look at an Old Bandaid* [*sic*], 14 Chicano-Latino L. Rev. 20, 21 (1994).

The federal courts of this country have traditionally been a place of vindication for the rights of the politically unpopular individual. In 1967, in another time of popular dissatisfaction with governmental policy being directed at individual representatives of the lawful authority of government, be they individual police officers or soldiers, this Court took the significant step of announcing what might seem a self-evident truth: "[T]hat policemen, like teachers and lawyers, are not relegated to a watered-down version of . . . rights." *Garrity v. New Jersey*, 385 U.S. 493, 500 (1967).

In the case at bar, the trial court honored this basic tenet of fairness and equity in the most extreme and difficult of events: the sentencing of police officers for criminal offenses committed in the course of their duties.

It must be emphasized at the outset that neither petitioner received anything like a slap on the wrist. Both men were sentenced to 30 months in federal prison, to be followed by two years of supervised probation. *Sentencing Memorandum* at 135a. Neither man will ever work again in his chosen profession. Both have been held up as an example and object of ridicule throughout the world. Any hope of quiet and private existence has been dashed. Neither will ever enjoy the emoluments of being a citizen, including the rights to vote, serve on a jury, or seek office. Both are quite likely to be

targets of attack for the rest of their lives, even after having completed their sentences. By and large, none of these collateral consequences of their convictions would occur but for the fact that these two men were police officers at the time of the offense.

In ordering a three-level departure downward (apart from the departure based on victim misconduct and provocation discussed above), the trial court correctly and accurately weighed the particulars of the cases of the two individual citizens before it and placed appropriately heavy emphasis on the extraordinary impact of a criminal conviction upon these two men, as well as on these men's extreme vulnerability to abuse in prison. None of these factors is prohibited from consideration by the Guidelines, yet still none independently was held by the district court to warrant a departure. Directly addressing this situation, the Commission has recognized

> [T]he possibility of an extraordinary case that, because of a combination of such characteristics or circumstances, differs significantly from the 'heartland' cases covered by the guidelines in a way that is important to the statutory purposes of sentencing, even though none of the characteristics or circumstances individually distinguishes the case.

Section 5K2.0, commentary.

There is simply no avoiding the fact that this case became a focal point for an unprecedented amount of anger and

emotion throughout this nation and much of the world. *See* Government's closing argument to the jury, reproduced in *Petition for Writ of Certiorari*, in *Powell v. United States*, Supreme Court Case No. 94-8842 at 11. The two petitioners can be said, quite without exaggeration, to have been two of the most unpopular men in the nation at the time of their trial(s). Any citizen in their position would reasonably fear exposure to attack and retribution once incarcerated. Beyond this subjective, if well-founded, fear, however, also existed more objective and equally well-founded indicia of the petitioners' extreme and unusual vulnerability to abuse in prison.

Significantly, the United States Department of Justice itself, through its Bureau of Prisons (hereinafter the "Bureau"), has explicitly recognized the unusual vulnerability and potential targeting for abuse of police officers who are incarcerated. According to the Bureau, among those persons "who require special management attention" during the classification and monitoring of prisoners in custody are "inmate[s] with a background in law enforcement . . ." U.S. Bureau of Prisons Regulations, 28 C.F.R. § 524.72(h) (1995). Similarly, in delineating which persons prison staff may appropriately consider at risk of harm and in need of affirmative protection from the general prison population, the Bureau specifically includes the following:

> (1) Victims of inmate assaults;
> (2) Inmate informants;
> (3) Inmates who have received inmate pressure to participate in sexual activity;
> (4) Inmates who seek protection through detention, claiming to be former law enforcement officers,

informants, or others in sensitive law enforcement positions, *whether or not there is official information to verify the claim*;
(5) Inmates who have previously served as inmate gun guards, dog caretakers, or in similar positions in state or local correctional facilities; . . .
(8) Inmates about whom staff has good reason to believe the inmate is in serious danger of bodily harm.

U.S. Bureau of Prisons Regulations, 28 C.F.R. § 541.23(a) (1995) (emphasis added). As can be seen, the mere claim of being a former law enforcement officer, without any verification whatsoever, is sufficient to warrant protective custody, isolated from the general prison population. This unique treatment of these certain prisoners reflects the very real danger of physical harm to persons in prison who are even *perceived* to be police officers, let alone persons like petitioners, who were known nation-wide as police officers in a case ripe with notoriety.

Commentators, too, have noted the significantly increased risk of abuse faced by law enforcement officers in custody. Paz, *supra*, at 21; L. Crocker, *Hate Crime Statutes: Just? Constitutional? Wise?*, 1992/1993 Ann. Surv. Am. L. 485, 502 (1993)("Among the most victimized members of prison inmate populations are former police officers and child molesters."). Clearly the trial court was well within its discretion to conclude that the petitioners possessed an "extreme vulnerability to abuse in prison." *Sentencing Memorandum* at 125a. Even under a *de novo* review, common sense as well as the weight of authority convinces us that the

risk of abuse is quite real and dangerous, and, as such, an appropriate and compelling factor in sentencing.

CONCLUSION

For the foregoing reasons, *amicus curiae* the National Association of Police Organizations respectfully requests that the Court grant petitioner Koon and petitioner Powell's applications and reverse the judgement in this case of the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted this 9th day of November, 1995,

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